SIXTH CIRCUIT REVIEW

Are Online Spaces 'Places of Public Accommodation' Under the ADA? It Is Still Unclear in the Sixth Circuit.

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In 1990, the United States Congress passed the American's with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213 (2012), a civil rights law that prohibits discrimination against individuals with disabilities. As the world has moved into the digital age, courts have challenged the application of Title III of the Act, Public Accommodations and Services Operated by Private Entities. *Id.* at §§ 12181–12189.

The ADA applies to public accommodations, which are generally businesses, including private entities, that are open to, or provide goods or services to, the public. All the examples of public accommodations listed in the statute are brick-and-mortar locations (think hotels, restaurants, retail merchants, stadiums, movie theaters, and day care centers). Where does that leave online spaces? Should people with disabilities be afforded reasonable access accommodations on the web as well?

These questions arise in the context of whether blind individuals using screen reading technology are entitled to accommodations while accessing the internet. A recent case asked whether the ADA's Title III provisions cover online spaces, but the Sixth Circuit declined to answer. In its August decision, *Brintley v. Aeroquip Credit Union*, 936 F.3d 489 (6th Cir. 2019), the Court stopped short of answering the question of whether Title III of the ADA protects a blind woman attempting to access the website of a brick-and-mortar business. Instead, the Court determined that the plaintiff lacked the prerequisite Article III standing to bring her case.

Unfortunately, lack of standing is a common occurrence in cases pressing the issue of ADA compliance. Injunctive relief and attorney's fees are the only remedies available for an individual bringing a suit against a place of public accommodation. 42 U.S.C. § 12188 (2012); 42 U.S.C. § 12205 (2012). These limited remedies disincentivize many people from bringing suit and push plaintiffs toward other non-legal remedies, namely taking their business elsewhere. To make the situation even more difficult, individuals must have Article III standing to bring a case in federal court.

As the Supreme Court articulated in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), an ADA plaintiff must allege an "injury in fact" that is "concrete and particularized" and "actual or imminent" rather than conjectural in order to have standing under Title III. In addition to these basic requirements, when seeking injunctive relief, the Supreme Court held in *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974), that "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects." When applied to an ADA complaint, this means that a plaintiff must establish both an actual, particular injury and that he or she will continue to be injured in the future. Simply visiting a place of public accommodation once and being unable to access it is insufficient. A plaintiff must show that he or she will continue to require access to that space and continue to be discriminated against because of his or her disability.

With the lack of an incentive to bring a case, much of the action in ADA claims has come in the form of "testers," much like the plaintiffs seen (and allowed) in federal Fair Housing Act and Title VII employment cases. Testers are individuals who visit various establishments to "test" their compliance with ADA standards, bringing suit against those that do not meet the established requirements. These testers often bring hundreds of cases, much to the chagrin of the federal court system. Federal courts have not been highly receptive to allowing these tester suits, often through finding a lack of standing.

The Sixth Circuit followed the majority of other circuits by making it harder for testers like Ms. Brintley to bring ADA claims. Ms. Brintley attempted to visit two credit union websites but was unable to access the content because of the inability of her screen reading technology to accurately read the content. She sued the two credit unions, claiming violations of Title III of the ADA. But the court found that she could not actually be a customer of those credit unions because she did not meet their member eligibility requirements, so she could not prove an injury-in-fact, and therefore lacked standing to sue.

Brintley argued that (1) she suffered an informational harm by not being able to access the financial tools publicly available on the website and (2) she was no different than any other individual deciding if she wanted to become a customer. That was not enough. The court refused to grant her standing. As they stated, "[M]erely browsing the web, without more, isn't enough to satisfy Article III. And whatever that 'more' may entail, Brintley doesn't have it."

So here ADA plaintiffs stand. Without standing. Is a website a

place of public accommodation in which people with disabilities are entitled to protection against discrimination? Are courts going to continue to allow online spaces, spaces where $517.36 billion (or 14.3%) of total retail sales in 2018 occurred, to be inaccessible to people with visual disabilities? The world is evolving, and change can be slow in disability protections when individuals are disincentivized from bringing cases and those that do bring cases have to fight for standing.

Courts are split regarding whether Title III is limited to physical spaces. They will likely continue to be until the perfect case comes along—the perfect alignment of the stars in which a person with clear standing suffers from lack of accessibility in an online space. There was hope that this case had come, but unfortunately the wait continues. In *Domino's Pizza LLC v. Robles*, 913 F.3d 898 (9th Cir. 2019), a blind repeat customer of a popular pizza chain was continuously unable to complete an online order through the chain's digital applications due to a lack of compatibility with screen reading technology. The Supreme Court of the United States recently denied certiorari, meaning that for now, ADA plaintiffs are in a holding pattern. Hopefully courts will soon answer the question: Are online spaces "places of public accommodation" under the ADA?